2021 WL 7081914 (Ariz.App. Div. 1) (Appellate Brief)
Court of Appeals of Arizona, Division 1.

San Carlos Apache TRIBE, Appellant,

v.

State of Arizona, Water Quality Appeals Board, Department of Environmental Quality, Appellees,

Resolution Copper Mining, LLC, Intervenor/Appellee.

No. 1 CA-CV 21-0295.
December 8, 2021.

Maricopa County Superior Court No. LC2019-00264-001

Appellant's Reply Brief

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***1 INTRODUCTION**

¶1 This case comes before this Court on an appeal of the judicial review of an administrative agency decision by the Arizona Water Quality Appeals Board ("WQAB"). The superior court conducted a review of the WQAB final decision pursuant to

Judicial Review of Administrative Decisions Act ("JRADA"). The superior court's JRADA ruling was entered on March 26, 2021. The WQAB recently filed with this Court a notice of non-participation in this appeal on October 13, 2021.

¶2 The Tribe filed its opening brief on August 16, 2021. Appellee Arizona Department of Environmental Quality ("ADEQ") and Intervenor Resolution Copper Mining, LLC ("Resolution") filed separate answering briefs on October 18, 2021.

¶3 In those briefs, ADEQ and Resolution have avoided addressing a key issue in this case; that is, if Resolution is a new mine and consequently a new source of discharge, it cannot discharge any effluent into Queen Creek. ADEQ, Resolution and WQAB treat this case as an ordinary review of an administrative agency decision by the superior court. It is not.

¶4 As more fully discussed below, the Tribe has presented issues in this case which are of first impression in Arizona courts. Because there are no published ***2** decisions which address these issues, the Tribe submits this Court's review of this case is appropriate.

¶5 As an initial matter, the Tribe disputes the WQAB's recently filed nominal party notice. The only rationale presented by the WQAB's notice is "to avoid a potential adverse attorneys' fees award...". (Electronic Docket No. 589 at 2.) The Tribe has never sought, and does not now, seek attorney's fees from the agency. Because questions regarding the procedures utilized by the WQAB are at issue in this case, the Tribe submits the WQAB is not a nominal party. "An agency whose functions are affected by a challenged statute which it is responsible for administering and upholding is not a nominal party in litigation involving the statute, even if the agency elects to allow private parties to take the lead in asserting the validity of the statute." *Kadish v. Arizona State LandDept.*, 177 Ariz. 322, 331, 868 P.2d 335, 344 (App. 1993). The Tribe has challenged the WQAB's procedures in this appeal. The Tribe submits the principle pronounced in *Kadish* applies to the WQAB's regulations and procedures. The Tribe respectfully submits this Court should order the WQAB to participate in this appeal.

¶6 The Tribe submits this combined reply to ADEQ's and Resolution's separate answering briefs.

***3 I. ADEQ DOES NOT CLARIFY THE FACTUAL RECORD SINCE THE TRIBE DID NOT MISCHARACTERIZE THE WQAB'S REMAND ORDER.**

¶7 ADEQ's answering brief purports to clarify the factual record. ADEQ claims the Tribe repeatedly misstated the nature of the WQAB's remand order to ADEQ. (ADEQ AB at 9-11). The Tribe acknowledged in its opening brief that WQAB's remand order was permissive. (OB at 7, 12, 13). Indeed, the Tribe stated, "the Board 'permitted' rather than directed ADEQ to disregard the selected ALJ's Findings of Fact ..." (OB at 13).

¶8 The argument presented in ADEQ's answering brief mischaracterizes that the Tribe argues the WQAB's remand order was mandatory. The Tribe's brief repeatedly characterized the remand order as permissive. (OB at 7, 12, 13). ADEQ's argument does not clarify the factual record. Instead, ADEQ interjects this argument which is without factual or legal basis and should therefore be disregarded by the Court.[1]

***4 II. ADEQ ERRONEOUSLY ATTRIBUTES AN ATTORNEY'S FEE REQUEST TO THE TRIBE.**

¶9 ADEQ claims the Tribe erroneously requested attorney's fees pursuant to A.R.S. § 12-2030. (ADEQ AB at 45). ADEQ does not refer to any portion of the record to support its claim that the Tribe made such a fee request. ADEQ cannot cite any portion of the record because the Tribe has never made an attorney's fee request in this case.

III. QUEEN CREEK IS AN IMPAIRED WATERWAY AND RESOLUTION IS PROHIBITED FROM OBTAINING A PERMIT TO DISCHARGE EFFLUENT INTO IT.

¶10 There is no debate that Queen Creek is an impaired waterway, and it has been identified as such by ADEQ. Due to excessive copper contamination from historical mining activities in the region, Queen Creek is included on Arizona's list of impaired waters under § 303(d) of the Clean Water Act. There is also no dispute that ADEQ has not finalized Total Maximum Daily Loads ("TMDL") for Queen Creek.[2] According to the Clean Water Act, each state must develop TMDLs for all the waters identified on their Section 303(d) list of impaired waters.

***5** ¶11 Queen Creek does not meet any applicable water quality standards because none have been established. If the Resolution Copper Mine is a new source of copper effluent, any discharge permit which allows copper to be introduced into Queen Creek should not have been issued by ADEQ. *See Friends ofPinto Creek v. EPA,* 504 F.3d 1007, 1011-1012 (9th Cir. 2007).

¶12 Superior Court review of a final administrative decision is performed pursuant to the Judicial Review of Administrative Decisions Act ("JRADA"). ADEQ and Resolution filed a joint brief during the superior court's review of the WQAB's final administrative decision. The WQAB had remanded the case to ADEQ to perform a "new source" analysis as the administrative law judge had recommended.

¶13 ADEQ's "new source" analysis was submitted to the WQAB on February 15, 2019. The new source analysis conducted by ADEQ presupposed the existence of an old mining operation; the Magma Mine. ADEQ makes that argument in a major portion of its answering brief. (ADEQ AB at 25-34). ADEQ's new source analysis presupposes the existence of the older mining operations in order to assert ***6** the new Resolution Copper Mine is a continuation of the old operations. In essence, it is an attempt to grandfather a new mine through the umbrella of a played-out mine. Citing its new source analysis, ADEQ asserts:
A mine is defined (under 40 C.F.R. § 440.132(g)) as an "area," that "includes all land and property where the work of extracting ore is done by any means or method." (IOR 466 at 24.) "A mine is constantly expanding to extract new ore." (*Id.) The ADEQ considered the new features that had recently been constructed at the Mine as "being both fully integrated with existing process and fully engaged in the same general type of activity." (Id.; see also* § 122.29(b) (1)(iii).) The new features also had no [new source performance standard] that independently applied to them. (IOR 466 at 24; *see also* § 122.29(b) (2).) *The ADEQ also concluded that the new features were not new features under the [Clean Water Act] because they were "constructed at a site where existing sources [were] located" (see* § 122.29(b)(1)(i)), they "[did] not totally replace the process or production equipment at the site" (*see* § 122.29(b)(1)(ii)), and they were not "substantially independent of an existing source at the site" (*see* § 122.29(b)(1)(iii)). (IOR 466 at 24-25.)

(ADEQ AB at 33)(Emphasis added). In other words, ADEQ's new source analysis is dependent entirely on the preexistence of the old Magma Mine.

¶14 Similarly, the entirety of Resolution's answering brief presupposes that the Resolution Copper Mine is the same mine as the 1915 Magma Mine. If this in fact were true, the Tribe would not be here. However, the facts as developed by the administrative law judge and adopted by the WQAB in its final administrative decision do not support this fantastical conclusion, as explained below.

***7** ¶15 ADEQ and Resolution also contend that Queen Creek could still receive Resolution effluent discharges because the ADEQ discharge permit already required the most stringent discharge limits required by law. (ADEQ AB at 21, 24-25, 30-34, 34-35; Resolution AB at 2-6). This is ADEQ's and Resolution's core argument. The superior court agreed stating that the "distinction [between existing and new sources] is based on the concept that new facilities have the opportunity to install the best and most efficient production processes and wastewater treatment technologies." quoting 49 Fed. Reg. 38043 (Sept. 26, 1984). According to the superior court "the [discharge] Permit already requires compliance with the most stringent effluent discharge limits required by law." (Electronic Docket No. 602 at 9).

¶16 The arguments and conclusions asserted in the foregoing three paragraphs assume that any effluent discharge into Queen Creek is allowed at all by a new source. However, the Clean Water Act prohibits a new source from discharging effluents into Queen Creek under 40 CFR § 122.4 as interpreted by *Friends of Pinto Creek v. EPA,* 504 F.3d 1007 (9th Cir. 2007).

¶17 *Friends ofPinto Creek,* clearly applies in this case. The Ninth Circuit's analysis is exactly applicable here. 504 F.3d at 1011-1015. ADEQ does not address the application of *Friends ofPinto Creek* to this case in its answering brief. ***8** Resolution's only reference appears in a footnote. (Resolution AB at 3, fn. 1). In its entirety that footnote reads: "The Tribe's main authority, *Friends ofPinto Creek v. U.S. EPA,* 504 F.3d 1007 (9th Cir.) (2007), *cert. denied,* 555 U.S. 1097 (2009), involved proposed construction of a *brand new mine* in a greenfield area." (Emphasis added.)

¶18 Although buried in a footnote, Resolution has grasped the point. *Friends of Pinto Creek* applies precisely because Resolution is a brand new mine. The unified position taken by ADEQ and Resolution is simply that the old Magma Mine facilities and infrastructure rendered Resolution into an existing mine. This argument is specious, and certainly incorrect factually and legally.

¶19 ADEQ has failed to develop schedules for bringing Queen Creek into compliance with applicable water quality standards. The application of 40 CFR § 122.4 was presented in the Tribe's opening brief. (OB at 2, 21-24). This argument is squarely before the Court and any suggestion it has been waived by the Tribe is false.

¶20 The administrative law judge's Findings of Fact, which were ultimately adopted *in toto* by the WQAB in its final administrative decision (*See* Resolution AB at 9), establish that the orebody which Resolution intends to mine is not a part of the Magma Mine. As Resolution noted in its Answering Brief, the WQAB ***9** adopted the administrative law judge's findings. *Id.* Those findings established *See* Findings of Fact Nos. 4, 13, 16-17, 19-20, 58-80. Specifically, Findings of Fact Nos. 58, 60, 64-65, established that the orebody mined by Magma was played out. Finding of Fact No. 58 states: "RCM will be mining ore from what is now known as the Resolution ore body located at the [East Plant Site]. Although Magma owned this ore body, it is a separate ore body from that which Magma mined." (footnote omitted). Finding of Fact No. 60 further states: "The Resolution ore body ranges from about 4,500 to 7,000 feet below ground surface ("bgs"), which is about is about 2,000 feet deeper than the Magma ore body. The footprint area of the Resolution ore body is a little over one square mile and the ore body is up to 1,600 feet thick." (Emphasis added). It is clear therefore that the Resolution ore body is distinct from the Magma Mine ore body.

¶21 According to ADEQ's and Resolution's reasoning, any number of new facilities or infrastructure may be constructed on the old Magma Mine site to extract minerals virtually anywhere in Pinal County. The only limitation would be the expense Resolution would be willing to incur and legal access to the ore body. In theory, any public lands subject to mining exploitation could be reached. Such reasoning defies logic and the law.

***10** ¶22 The absurdity of ADEQ's and Resolution's position that Resolution is not a new source is exemplified by the ALJ's Finding No. 113: "Thus, according to ADEQ, regardless of what copper-mining features RCM adds or constructs, *even if it conducts copper mining operations in other parts of Pinal County,* as long as RCM treats the mine drainage on the existing site, these new features will not be new sources. Mr. Koester testified to the effect that these new features would not be new sources because by adding more structures RCM is just expanding the Magma mining operations and producing more mine drainage." (Emphasis added.)

¶23 The Resolution Copper Mine is a new source and not a mere extension and continuation of the Magma Mine. Resolution Copper Mine cannot discharge any effluent into Queen Creek according to *Friends ofPinto Creek.* The superior court recognized this principle: "Queen Creek is an 'impaired' waterway, and federal law apparently makes it extremely difficult, if not impossible, for a new source to obtain a permit to discharge effluent into impaired waterways." Citing *Friends of Pinto Creek v. EPA,* 504 F.3d 1007 (9th Cir. 2007) (discussing 40 C.F.R. § 122.4(i) and its proscription of discharges into bodies of water that fail to meet applicable water quality standards). (Electronic Docket No. 602 at 8).

¶24 The superior court decided that the Resolution Copper Mine was not a new source based upon the Tribe's motivations for proceeding with this case. "[I]t ***11** appears that Appellants' motivation for opposing the Permit is not to require compliance with more stringent effluent discharge requirements, but to stop issuance of the Permit altogether as part of an effort to halt mining at the site." (Electronic Docket No. 602 at 8). Assuming the superior court's attribution of the Tribe's motivation is absolutely correct, a discharge permit still could not be issued to Resolution because of the proscriptions set forth in *Friends ofPinto Creek* and 40 CFR § 122.4(i).

¶25 The Tribe's motivations are completely irrelevant to any legal analysis whether Resolution Copper Mine complies with 40 C.F.R. § 122.4(i) and *Friends ofPinto Creek.* The superior court should not have affirmed the WQAB's final administrative decision and this case should be remanded.

IV. THE WQAB'S OCTOBER 13, 2021 NOTICE OF NONPARTICIPATION IN THIS APPEAL PURSUANT TO A.R.S. § 49-322(C) SHOULD BE EXAMINED BY THIS COURT TO DETERMINE IF THE WQAB'S ROLE IN THIS APPEAL WAS MORE THAN THAT OF A NOMINAL PARTY.

¶26 On October 13, 2021, the WQAB filed a notice with this Court claiming that it was a nominal party in this appeal and that it would not participate in this appeal unless further directed by the Court. The WQAB asserted it was a passive or nominal party in the appeal of its final administrative decision. The WQAB ***12** asserted it was seeking to avoid a potential attorney's fee award pursuant to A.R.S. § 12-348(H)(4).

¶27 The Tribe has never sought attorney's fees in this case. The only reason cited by the WQAB for asserting a nominal party status in its October 13, 2021 notice is avoidance of attorney's fees.

¶28 *Cortaro Water Users' Ass'n v. Steiner,* 148 Ariz. 314, 714 P.2d 807 (1986) explained that a State agency may be exempt from an award of attorneys' fees under a nominal party exclusion as long as the agency simply certifies the record and answers a complaint. 148 Ariz. at 316, 714 P.2d at 811. However, if the agency engages in an advocacy role or takes an active part in the proceedings, it loses the nominal party status. *Id.* In *Cortaro,* the Supreme Court did not decide when an agency was or was not a nominal party. *Id.*

¶29 The Tribe respectfully submits that if this case is remanded for further proceedings the WQAB nominal party status should not have application or, at a minimum, be reexamined by the superior court.

V. THE TRIBE DID NOT WAIVE ANY CHALLENGE TO THE WQAB'S REMAND ORDER.

¶30 The superior court concluded that it lacked jurisdiction to review the WQAB's remand order of November 19, 2018. The superior court reasoned the ***13** WQAB's order was not a final decision and thus not reviewable by the court under the JRADA. (Electronic Docket No. 602 at 9-10).

¶31 The superior court went on to fault the Tribe for not objecting to the remand order early in the proceedings. "If Appellants believed the Board engaged in an improper procedure, Appellants should have objected within a reasonable time after the Board's November 19 order." The superior court found the Tribe waived the issue and refused to address it. (*Id.*)

¶32 The superior court's finding of waiver is inconsistent with a determination that only a final administrative decision may be reviewed under the JRADA. The WQAB final administrative decision acknowledged that the remand order was considered on February 15, 2019 and in proposed final administrative decisions filed by the parties and considered by the WQAB on June 18, 2019. The latter date was a mere seven days before the WQAB's final administrative decision.

¶33 The superior court's finding of waiver was factually wrong. On remand, the Tribe should be permitted to advance any argument it may have addressing error in the administrative agency's procedures.

*14 CONCLUSION

¶34 The record is clear - the WQAB acted contrary to law and was arbitrary and capricious when it upheld ADEQ's determination that the RCM mine is not a "New Source". The Tribe respectfully request the Court order this case remanded to the superior court for further proceedings.

Respectfully submitted this 8th day of December, 2021.

SAN CARLOS APACHE TRIBE

By: */s/ Alexander B. Ritchie*

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Footnotes

1 Indeed, this section of ADEQ's answering brief interjects arguments which have nothing to do with ADEQ's remand order.

2 A TMDL is a regulatory term under Section 303(d) of the U.S. Clean Water Act, used in describing a plan for restoring impaired waters that identifies the maximum amount of a pollutant, in this case copper, that a body of water can receive to ensure that water quality standards can be attained. A TMDL is thus both a quantitative assessment of pollution sources and pollutant reductions needed to restore and protect U.S. waters, and a planning process for attaining water quality standards.

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